STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER YOUNG,

Plaintiff-Appellant,

v

CHRIS ESKER and DAVID B. ESKER,

Defendants-Appellees.

UNPUBLISHED
June 26, 1998

No. 199134
Oakland Circuit Court
LC No. 95-510335 NO

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals an order granting summary disposition to defendants in this negligence action. We reverse and remand.

We review the grant of an MCR 2.116(C)(10) motion for summary disposition de novo on appeal. *Royce v Duthler*, 209 Mich App 682, 688; 531 NW2d 817 (1995). Plaintiff, the party opposing the motion, has the burden of demonstrating a genuine and material issue of disputed fact. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are drawn in favor of the opposing party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff advanced a number of theories as to how defendants were negligent. He claims there was sufficient evidence for a factfinder to conclude that, notwithstanding the deposition testimony of defendants and Simonson, one of the defendants (rather than Simonson) let the dog outside on the morning of the accident, that defendants instructed Simonson that he could let the dog out without using a leash, or that leaving the dog out in any manner was negligent given the testimony regarding the dog's propensity to roam.

The trial court did not explicitly review the sufficiency of evidence as to these theories but, instead, generally found the uncontroverted evidence to be that "these named defendants" were not

---

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

negligent because an "intervening third party" (Simonson) let the dog out of the house. Implicit in this reasoning was the trial court's conclusion that summary disposition was warranted against plaintiff's factual claim that one of the defendants let the dog out (rather than Simonson).

We agree with this implicit conclusion. Plaintiff came forward with no evidence to controvert the testimony of defendants and Simonson that Simonson, rather than one of the defendants, let the dog out. In addition, we conclude that plaintiff failed to come forward with any evidence to contradict defendants' sworn testimony that Simonson was instructed to use and in fact did use a leash. Accordingly, to the extent that the order granting summary disposition prevented plaintiff from proceeding on these theories of negligence, we affirm that order.

Nonetheless, we do not conclude that summary disposition was appropriately granted against plaintiff's entire negligence claim. The undisputed fact remains that the dog was out of control and free to roam the public streets at the time of the accident. This was in violation of a penal statute, the Dog Law of 1919, which states that "[i]t shall be unlawful . . . for any owner to allow any dog . . . to stray unless held properly in leash," MCL 287.262; MSA 12.512, and which further provides that violation of that proscription is a misdemeanor, MCL 287.286; MSA 12.536. Accordingly, plaintiff was entitled to a rebuttable presumption of negligence. *Cassibo v Bodwin,* 149 Mich App 474, 477; 386 NW2d 559 (1986).

Further, plaintiff could well argue that defendants were negligent in providing an insufficient restraint for Simonson to use in securing this rather large dog. There is no dispute that the leash hook was broken following plaintiff's accident.[1] In addition, the neighbor's testimony would be relevant in determining whether defendants should have known that the dog had a tendency toward running free and, thus, should have known that he might try to break away from the leash. As noted in *Trager v Thor*, 445 Mich 95, 106; 516 NW2d 69 (1994),[2] quoting *Arnold v Laird,* 94 Wash 2d 867, 871; 621 P2d 138 (1980):

> [A] negligence cause of action arises when there is ineffective control of an animal in a situation where it would reasonably be expected that injury could occur, and injury does proximately result from the negligence. The amount of control required is that which would be exercised by a reasonable person based upon the total situation at the time, including the past behavior of the animal and the injuries that could have been reasonably foreseen.

We conclude that plaintiff presented enough evidence for a factfinder to conclude, considering "the total situation at the time," that defendants unreasonably exercised "ineffective control" of their dog.

Finally, it appears that the trial court may have concluded that defendants are excused from liability because Simonson, characterized as "an intervening third party," put the dog out of the house on the morning of the accident. We do not agree with that analysis. Simonson was left in charge of defendants' household and, thus, acted as their agent in caring for the dog. Even if the factfinder concludes that defendants themselves were not directly negligent, any negligence that might be attributed

to Simonson would be imputed to defendants under usual *respondeat superior* principles. See Prosser & Keeton, Torts (5th ed), § 69, pp 499-501.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan

[1] The dispute over who discovered this is of no consequence.

[2] Although *Trager* is helpful in summarizing the standard of care applicable in this case, it is otherwise inapposite. *Trager* considered "which theories of liability are appropriate for an action against one in temporary possession of a domestic animal . . .," *Trager, supra* at 97; the person in temporary possession of an animal in this case, Simonson, has not been named as a defendant.